NO. 3214 IN EQUITY

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS W. MILLER, Alien Property Custodian of the United States of America,
Appellee,

v.

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington; and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION,

TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF OF APPELLEE

H. G. ROWLAND,
Attorney for and Representative of Appellee.

DIX H. ROWLAND,
Of Counsel.

BARRETT-REDFIELD PRESS, 1008 SO. KAY, TACOMA

NO.....IN EQUITY

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS W. MILLER, Alien Property Custodian of the United States of America,
Appellee,

v.

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington; and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION, TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF OF APPELLEE

H. G. ROWLAND,
Attorney for and Representative of Appellee.

DIX H. ROWLAND,
Of Counsel.

NO.....IN EQUITY

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS W. MILLER, Alien Property Custodian of the United States of America,
Appellee,

v.

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington; and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION, TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

While the Statement of the Case made by appellants is in the main correct, yet in order that the court may clearly understand appellee's position, we

deem a short statement on our part necessary.

The plaintiff is the Alien Property Custodian of the United States of America, appointed by the President of the United States, under and by virtue of an act of Congress of the United States of America known as the "Trading with the Enemy Act" passed on the 6th day of October, 1917, and the acts amendatory and supplementary thereto, possessing all the powers granted by said acts of Congress and the executive orders issued in pursuance thereof; (Amended complaint paragraph I, Page 36 of Transcript of Record); that the defendant Edward Clifford is the Superintendent of Labor and Industries of the State of Washington and the defendant E. S. Gill is the Supervisor of Industrial Insurance, acting under said Clifford; that the said Superintendent and Supervisor exercise the duties formerly exercised by the commissioners of the Industrial Insurance Department of the State of Washington (Paragraph II of Amended complaint, Page 36 of Transcript of Record); that all the claims involved herein had been allowed by the defendants and their predecessors to the alien enemy claimants and warrants issued for said claim in the names of the alien enemy claimants in many cases, but said warrants were held by appellants but not delivered when war was declared by United States. There remained nothing for the appellants to do in regard to the claims for which no warrant had issued, except to give a voucher to claimants therefore. (Para-

graph III of Amended complaint, Page 38 of Transcript of Record).

All the claims were reported to the Alien Property Custodian while the United States was at war with the belligerent powers of which the claimants were subjects in pursuance with the provisions of the Trading with the Enemy Act. That a demand was made by the Custodian for the amounts due on all these allowed claims before the declaration of peace between the United States and the belligerent powers, the Custodian after investigation having determined that said warrants and said sums of money due as shown by the schedules attached to the complaint were due to enemies or allies of enemies of the United States not holding a license from the President, (Paragraph IV of Amended complaint, Page 40 of Transcript of Record); that said warrants and said funds are in the sole control of appellants and no State officer, except appellants, stands in the way of the deivery of them to appellee (Paragraph IV of Amended complaint, Page 40 of Transcript of Record).

The warrants are in the custody of the Clerk of the District Court at Tacoma. Upon refusal of the appellants to deliver said warrants and said funds to appellee this action was brought for their possession. The State of Washington was originally a party but was dismissed out by the Court, who held that only the appellants were necessary parties. The appellants filed a motion to dismiss against appel-

lee's amended complaint. This was overruled and the appellants, refusing to plead further, judgment went against them.

ARGUMENT.

I

Had the District Court Jurisdiction of the Cause of Action?

The action was brought under the Trading with the Enemy Act which in the very recent decision of *Stoehr v. Wallace*, 255 U. S. 241, 65 Law Ed. 610, has been held to apply in all actions of a possessory nature involving seizures of property of alien enemies or their allies upon land. In the language of this opinion:

"The Trading with the Enemy Act, whether taken as originally enacted, October 6, 1917, chap. 106, 40 Stat. at L. 411, Comp. § Stat. § 3115½ a, Fed. Stat. or as since amended, March 28, 1918, chap 28, 40 Stat. at L. 459, 460; November 4, 1917, chap, 201, 40 Stat. at L. 1020; July 11, 1919, chap. 6, 41 Stat. at L. 35; June 5, 1920, chap. 241, 41 Stat. at L. 977, is strictly a war measure and finds its sanction in the constitutional provision art. 1, § 8, cl. 11, empowering Congress "*to declare war*, grant letters of marque and reprisal, *and make rules concerning captrues on land and water.*" *Brown v. United States*, 8 Cranch, 110, 126, 3 L. ed. 504, 510; *Miller v. United States (Page v. United States)* 11 Wall. 268, 305, 20 L. ed 135, 144."

Commenting in the case of *Stoehr v. Wallace*, 255 U. S. 24, the Supreme Court said:

"It is with parts of the act which relate to captures on land that we now are concerned. They invest the President with extensive powers respecting the sequestration, custody, and disposal of enemy property. By § 5 he is in terms authorized to exercise "any" of these powers "through such officer or

officers as he shall direct." By § 6 he is authorized to appoint and "prescribe the duties of" an officer to be known as the Alien Property Custodian. By §7c, as amended November 4, 1918, direct provision for sequestering enemy property is made as follows:

"If the President shall so require any money or other property including * * * choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this act."

But the jurisdiction of the District Court of this action does not depend alone on the Trading with the Enemy Act.

The district courts are by previous acts of Congress given jurisdiction of this class of cases. Section 24 of the Judicial code provides that the district courts shall have original jurisdiction in:

"First: Suits of a civil nature, at common law or in equity, brought by the United States or by any officer thereof authorized by law to sue * * *

"Third: * * * of all seizures on land and waters not within admiralty and maritime jurisdiction * * *"

The Supreme Court of the United States has held that an action brought by the Alien Property Cus-

todian for possession of securities or property comes under this last class. *Stoehr v. Wallace*, 255 U. S. 241, 65 L. ed. 604; *Central Trust Co. v. Garvan*, 254 U. S. 533, 65 L. ed. 403.

So it appears that Congress had power to make all necessary rules concerning captures on land and water, and clothed the District Courts with the necessary power in order to put in effect the Constitutional powers to enable it to successfully carry on the World War and make the necessary settlements with the alien belligerents and their allies and to still further carry out this power, enacted the Trading with the Enemy Act, which provided for the Appointment of the Alien Property Custodian and defined his powers.

And it is held that the determination of the Alien Property Custodian as to what property is enemy owned and what should be demanded by him is the determination of the President of the United States, is final and conclusive and that the remedy of one not satisfied therewith is to make a claim under Sec. 9 of said act.

Central W. Trust Company v. Garvan, 254 U. S. 554, Confiscation Cases *(United States v. Clarke)*, 20 Wall 92, 109, 22 L. ed. 320, 323, *Stoehr v. Wallace*, 255 U. S. 245 et cet.

The Trading with the Enemy Act expressly gives the Districts Court of the United States Jurisdiction as to actions arising under it. Section 17, of said act, found in Vol. 40, Part 1, page 411, Statutes at

Large, reads as follows:

"That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act, with a right of appeal from the final order or decree of such court, as provided in sections 128 and 238 of the Act of March 3, 1911, entitled 'an act to codify, revise and amend the laws relating to the judiciary.' "

Furthermore, the President of the United States, whose representative the appellee is, as head of the excutive department of the government given the power and duty of carrying on war, and sequestration of enemy property is one of the necessary things to be done under this power.—Section 2, Paragraph I, Constitution.

II

Does the Trading with the Enemy Act apply to the case at issue?

1. The act in subdivision C, Section 7, reads as follows:

"If the President shall so require, any money or other property owing to, belonging to, or held for, by on account of, on behalf of, or for the benefit of an enemy, or ally of an enemy, not holding a license granted by the President hereunder, which the President, after investigation, shall determine is so owing, or so belongs, or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian."

Section 2, subdivision C, of the Trading with the

Enemy Act, defines the word "person" as follows:

"The word 'person' as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or *body politic.*"

While not conceding that the present action is one against the State of Washington, the provision of the act are broad enough to include a State.

The definition of a body politic is not borne out by the authorities cited in paragraph III of appellants' brief, nor is it subject to the construction placed on it by appellants.

We will cite a few of the text writers on the subject:

Anderson's Law Dictionary, Page 127, defines it as follows:

"The governmental, sovereign power, a city or a state."

Black's Law Dictionary, as stated in appellants' brief, says that it is a name applied to the State.

The Supreme Courts of various States have defined it as "The State or nation as an organized political body of people collectively."

People v. Snyder, 279 Ill., 435-440, 117 N. E. 119.

But, fortunately, the Supreme Court of the United States, in an opinion written by Chief Justice Gray, quoting Chief Justice Marshall, defined the term so that in so far as its meaning and interpretation by the United States Courts is concerned, there can be no doubt. The United States Supreme

Court takes the same views as that taken by the highest Court of Illinois. In the case of *Von Brocklin v. Anderson*, 117 U. S. 119, 29 L. ed. 846, Justice Gray says:

"In the words of Chief Justice Marshall: 'The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American People, and endowed by them with great powers for important purposes. Its powers are unquestionably limited; but while within those limits, it is a perfect government as any other, having all the faculties and properties belonging to a government with a perfect right to use them freely, in order to accomplish the object of its institution.'" *(U. S. v. Maurice*, 2 Brock. 96, 109*)*.

And Webster's New International Dictionary, 1921 Edition, defines body politic as "The state as a politically organized body of persons or as exercising political functions."

So we see that the Trading with the Enemy Act using the term "body politic" in its usual accepted meaning refers to the State or sovereign power.

2. The contention is made by the appellants that the District Courts have lost jurisdiction because of the termination of the war.

It was held that the signing of the armistice did not terminate the control of the Alien Property Custodian. *Ins. Co. v. Ins. Co.*, 254 Fed. 852, and an examination of the treaties of peace between the United States and Germany and Austria clearly show that his control was not changed by the

treaties, but was preserved by them.

Section 5 of the treaty with Germany covers the subject and reads as follows:

"All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents or employees, from any source or by any agency whatsoever, and all property of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government or its agents, since July 31, 1914, loss, damage, or injury to their persons or property directly or indirectly. "Section 5 of German Treaty, proclaimed Nov. 21, 1921."

The Austro-Hungarian Treaty of Peace with the United States contains a similar provision. See

Section 5 of Austrian treaty, proclaimed November 17, 1921.

These treaties specially protect the Alien Property Custodian in the possession of all Alien-owned property, *demand* for which had been made prior to the Treaty of Peace, so the case at bar is expressly provided for.

3. It is contended by appellants that the claims involved in this action are of such a character as cannot be taken possession of on account of Section 6604-10, Rem. 1915 Code of Washington, which provides that prior to the issuance of the warrants, no assignment by operation of law or otherwise shall be made. This contention is swept away by the decision of the United States Supreme Court in *Central Union Trust Company v. Garvan*, 254 U. S. 269, reading as follows:

"To the conclusion that we reach, it is objected that the Custodian gets a good deal more than bare possession,—that the property is to be conveyed to him; and that, by the Act of March 28, 1918, chap. 28, 40 Stat. at L. 459, 460, enlarging § 12, the Custodian "Shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, etc., to him, and is given the power to sell and manage the same as though he were absolute owner. All this may be conceded if no claim is filed. But this act did not repeal § 9, which is amended by the later Acts of July 11, 1919, chap. 6, 41 Stat. at L. 35, and of June 5, 1920, chap. 241, 41 Stat. at L. 977, and, as we have said, provides for immediate claim and suit, and requires the property in cases of suit to be

retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result. The present proceeding gives nothing but the preliminary custody, such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned, and does no more." See also *Kahn v. Garvan*, 263 Fed. 909.

Under Section 9, the appellants can assert every right that they possess.

The appellants argue that a claim due one under the Workman's Compensation act being in the nature of insurance is different from other claims.

The same contention was made in the last mentioned case. It was contended that the funds in the Garvan case were special funds for the security of American Policy holders. The Court held that even though such were the case, the determination of the Alien Property Custodian was final and conclusive in a possessory action and could not be inquired into.

4. The contention is made that the Trading with the Enemy Act is an interference with the Police Power of the State by the Federal Government. It is nothing of the kind, but is strictly a war measure and finds its sanction in the constitutional provision; Art. 1, Sec. 8, Cl. 11, empowering Congress: "To declare war, grant letters of marque and reprisal and make rules concerning captures on land and water."

Judge Cooley in his "Constitutional Limitations," on page 709, has well explained how the Police power of a state cannot conflict with the provisions

of the constitution of the United States such as the right of Congress to provide for all rules and regulations governing the seizure of property upon land and the sequestration of enemy property in time of war. The section reads:

"But while the general authority of the State is fully recognized, it is easy to see that the power might be so employed as to interfere with the jurisdiction of the general government; and some of the most serious questions regarding the police of the States concern the cases in which authority has been conferred upon Congress. In those cases it has sometimes been claimed that the ordinary police jurisdiction is by necessary implication excluded, and that, if it were not so, the State would be found operating within the sphere of the national powers, and establishing regulations which would either abridge the rights which the national Constitution undertakes to render absolute, or burden the privileges which are conferred by law of Congress, and which, therefore, cannot properly be subject to the interference or control of any other authority. But any accurate statement of the theory upon which the police power rests will render it apparent that a proper exercise of it by the State cannot come in conflict with the provisions of the Constitution of the United States."

Stoehr v. Wallace, 255 U. S. 240, and this is expressly kept in effect by the provisions of the Austrian and German Treaties.

The case cited by Appellants of *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, is against their contention, but is an authority that where the police power of a state conflicts with the War power of Congress, that the former must give way.

The emergency that caused Congress to pass the Trading with the Enemy Act did not cease with the Peace Treaties as shown herein by the treaties themselves and as held by the United States Supreme Court.

The contention of the Appellants is that the present action is in its amended form one against the State of Washington, and as such must be brought in the Supreme Court.

The Constitution of the United States provides:

"The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; * * * To controversies to which the United States shall be a party * * *"

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the Supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make." (Act III, Sec. 2, Const. of United States).

The Judiciary Act of 1789 gave the District Courts of the United States jurisdiction over the class of cases involving consuls and ambassadors. It was contended that original jurisdiction being in the Supreme Court of the United States, it was not

within the power of Congress to place it elsewhere and that as applied to action involving consuls the act was unconstitutional. The Supreme Court held that the United States Constittuion did not attempt to rest exclusive but only original jurisdiction in the Supreme Court.—*Bors v. Preston*, 111 U. S. 256, 28 L. ed. 420.

Likewise, Congress in exercise of its constitutional right, possessed the power to provide what tribunal should try cases involving the Trading with the Enemy Act and designated the District Courts of the United States. It had the same power to make this applicable to states as it previously did to consuls. This it did in making the act apply to a "body politic."

It is not a question of the amendment of the Judicial code by implication, but a question of providing a constitutional tribunal for trying cases arising under a War Measure.

The Supreme Court has held that Art. III of the Constitution of the United States has no application in cases where the United States is a party.—*U. S. v. Louisiana*, 123 U. S. 32, 31 L. ed. 69.

That this case is one by or against the United States cannot be questioned, even though it is brought by an executive officer.

The State of Louisiana v. James Rudolph Garfield, etc., 211 U. S. 70 53 L. ed. 92; *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. ed. 935; *Naganab v.*

Hitchcock, 202 U. S. 473, 50 L. ed. 1113; *Minn v. Hitchcock*, 185 U. S. 373.

The Alien Property Custodian takes possession of this property for the United States. It can only be taken away by act of Congress.

III

According to the overwhelming weight of authority, the present action is not one against the State.

It is difficult, sometimes, to differentiate and determine when a case is against a State and when against the officers of a State.

As a rule the test is if the action arises on account of some arbitrary or criminal act on the part of an officer or is the result of a tort committed by such officer it is not against the State, and this was the view taken by the learned Judge of the district Court when he dismissed the State of Washington as such from the action. An examination of the Amended Bill will disclose that the State Officials as such had done all that they were requested to do under the Workman's Compensation Act. They had approved and allowed the claims and drawn warrants for a large part of the compensation due. The State Treasurer is ready and willing to cash them when presented. The Auditor is ready and willing to issue warrants for the balance due on receiving from the appellants' vouchers therefore.

Sec. 16 of the Trading with the Enemy Act provides, among other things, that any person who re-

fuses to comply with any demand of the President of the United States, issued in compliance with the provision of said Act, shall be guilty of a felony. The refusal on the part of the appellants to comply with the order of the President to deliver possession of this property on the demand of the Custodian, is an unlawful act of the appellants and cannot be imputed to the State of Washington.

Appellants' contention that the present action in its present form is one against the State of Washington is based largely on the decision of the United States Supreme Court in *Lankford v. Platte Iron Works Company*, 235 U. S. 461, 59 L. ed. 316, 35 Sup. Court Rep. 173. The case might have some application, were it not that the case at bar arises on account of the torts of State officers in refusing to comply with the demands of the President of the United States and in violating a Federal Statute. The Supreme Court of the United States in a much later decision has shown where the line is to be drawn in distinguishing when an action is against a State and when it is not.—*Johnson v. Lankford*, 245 U. S. 544, 62 L. ed. 460.

In the case at bar all the claims had been allowed before the Custodian made his demand and $15,000 in warrants had been issued in the name of the alien enemies and were held by the appellants because of their inability to deliver them. The funds were no longer State funds, but belonged to the aliens because the claims had been passed on and approved.

Furthermore, the appellants had reported to the Custodian that they were not State funds, but belonged to such aliens. (Amended Complaint Paragraph IV, Pages 39 and 40 of Transcript of Record).

The immunity granted the state does not extend to damage done by its officers though acting under color of her authority, if illegally done. *Belknap v. Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 55 L. ed. 890, 35 L. R. A. (N. S.) 243, 31 Sup. Ct. Rep. 654.

No judgment is sought against state funds in the present action, but only possession of alien owned property which has been reported to the Alien Property Custodian by the appellants as belonging to alien enemies and their allies. *Reagan v. Farmer's Loane Trust Company*, 154 U. S. 362, 38 L. ed. 1014.

In the case of *Johnson v. Lankford*, 245 U. S. 544, Justice McKenna correctly stated the law: "The relief sought is against him (the defendant) because of his wilful or negligent disregard of the laws of the state * * *, We think the question, therefore, should be answered in the negative; that is, that the action is not one against the state. To answer it otherwise would be to assert, we think, that whatever an officer does, even in controvention of the laws of the state, is state action, identifies him with it, and makes the redress sought against him a claim against the state, and therefore prohibited by the 11th Amendment. Surely an officer of a state may be delinquent without involving the state in delinquency, indeed, may injure the state by delinquency

as well as some resident of the state, and be amenable to both." Commenting further, the Court said: "The present case finds example in *Hopkins v. Clemson Agricultural College*, 221 U. S. 635, 55 L. ed. 890, 35 L. R. A. (N. S.) 243, 31 Sup. Ct. Rep. 654, where the college was held liable for acts of trespass upon private property and it was said by Mr. Justice Lamar, speaking for the court, that immunity from suit was a high attribute of sovereignty—a prerogative of the state itself—which cannot be availed of by public agents when sued for their own torts"; and it was further said: "The 11th Amendment was not intended to afford them (public agents) freedom from liability in any case where, under color of their office, they have injured one of the state's citizens."'

Surely a state officer whose unlawful acts interfere with the rights of the President of the United States in carrying on a great war and settling with the belligerents afterwards, cannot claim when sued, as in the present case, for property which he has reported as belonging to alien enemies; that it is an action against the state over which the district courts have no jurisdiction.—*Johnson v. Lankford*, 245 U. S. 544.

The case of *Truax v. Raich*, 239 U. S. 35, 60 L. ed. 131, clearly draws the distinction between acts of officers erroneously performed and those arising in tort, and holds that the latter acts do not make a state liable. We quote from this opinion written by Mr. Justice Hughes:

"As the bill is framed upon the theory that the act is unconstitutional, and that the defendants, who are public officers concerned with the enforcement

of the laws of the state, are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the state. Whatever doubt existed in this class of cases was removed by the decisions in Ex parte Young, 209 U. S. 123, 155, 161, 52 L. ed. 714, 727, 729, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, which has repeatedly been followed. *Ludwig v. Western U. Teleg. Co.*, 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; *Western U. Teleg. Co. v. Andrews*, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286; *Herndon v. Chicago, R. I. & P. R. Co.*, 218 U. S. 135, 155, 54 L. ed. 970, 976, 30 Sup. Ct. Rep. 633; *Hopkins v. Clemson Agri. College*, 221 U. S. 636, 643-645, 55 L. ed. 890, 894, 895, 35 L. R. A. (N. S.) 243, 31 Sup. Ct. Rep. 654; *Philadelphia Co. v. Stimson*, 223 U. S. 607, 620, 56 L. ed. 572, 576, 32 Sup. Ct. Rep. 340; *Home Teleph. & Teleg. Co. v. Los Angeles*, 227 U. S. 278, 293, 57 L. ed. 510, 517, 33 Sup. Ct. Rep. 312."

IV

In conclusion we urge upon the Court:

1st. The 11th Amendment of the Constitution of the United States has no application to the present action, as it is not an action prosecuted by citizens of one of the United States against a state, the same being brought by the United States by one of its executive officers against State Officers acting in violation of a Federal Statute.

2nd. The Trading with the Enemy Act was passed by Congress by virtue of Art. 8, of the Constitution of the United States giving it the right to make rules concerning captures on land and water.

Such Act designated the District Courts of the United States as the tribunals having jurisdiction over violations and was a proper exercise of the war power.

3rd. The War power of congress, the authority of the Alien Property Custodian, and the jurisdiction of Federal Courts were not ended by the Treaties with Germany and Austria, but were expressly reserved by the treaties.

4th. The property in question was reported to the Custodian as belonging to alien enemies and demand made by him before the Treaty of Peace was signed, the State making no claim therefor.

5th. The action is not against the state, but against officers acting tortiously and seeking to interfere with the rights of the President of the United States.

6th. The Trading with the Enemy act being an exercise of the War power of Congress, the police power of the State in so far as it conflicts with it must give way.

7th. The State officers are fully protected by the Trading with the Enemy act in surrendering the custody of the property involved herein to the Alien Property Custodian and can assert any right which they may have under Sec. 9 of the Act.

8th. It was within the Power of Congress to provide what tribunal could exercise its war power and it could enact such legislation that would make

it possible for the United States to sue a State, in like manner, as it did when, by the act of 1789, it gave the District Courts Jurisdiction over consuls.

9th. The action being one in equity for the possession of alien owned property brought by an officer of the United States, and being an action under the laws of the United States is a proper subject for the Jurisdiction of the District Courts of the United States; and the Court, furthermore, has Jurisdiction as the action arises under the Constitution of the United States, the Trading with the Enemy Act having been passed for the express purpose of carrying into effect the Federal Constitution.

10th. Neither the appellants nor the State of Washington lose by appellants complying with the decree of the District Court. The decision is right and should be affirmed.

H. G. ROWLAND,
Representative of and Attorney for Appellee.

DIX H. ROWLAND,
Of Counsel.